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No. 07-427

FILED
OCT 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ERNESTO R. VASQUEZ,

Petitioner,

v.

LOS ANGELES COUNTY, DON KNABE, GLORIA MOLINA, YVONNE B. BURKE, ZEV YAROSLAVSKY & MICHAEL D. ANTONOVICH, in their official capacities as Supervisors, LA County,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1) Whether this Court should review the Ninth Circuit's holding that a county's decision to redesign its municipal seal and remove a Latin cross, among other symbols, failed to state a cognizable claim under the Establishment Clause?

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INTRODUCTION

This case is about whether an individual has the right to dictate by way of litigation what historical or cultural symbols a county can place on its municipal seal. In redesigning its municipal seal, Respondents County of Los Angeles and County Supervisors Don Knabe, Gloria Molina, Yvonne B. Burke, Zev Yaroslavsky, and Michael D. Antonovich (collectively "Respondents") included certain historical and cultural symbols and eliminated others. This decision is, and should be, within the Board's discretion.

Respondents chose to redesign the County seal to exclude a symbol which some courts have found unconstitutional. Among other changes, the County replaced a Latin cross with a depiction of a mission.[1] The Ninth Circuit properly found that Petitioner failed to state an Establishment Clause violation because the Respondents' redesign: (1) had a secular purpose; (2) had a secular effect; and (3) did not foster excessive entanglement with religion.

Petitioner seeks review of the Ninth Circuit's decision on the grounds that the ruling "eviscerates claims advanced under a hostility" theory and because Establishment Clause jurisprudence allegedly "is in disarray." In *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005), this Court reaffirmed the viability of the

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[1] The constitutionality of the Latin cross on the former Los Angeles County seal is not at issue in this case. The question is whether the County's decision to redesign the seal violated the Establishment Clause.

Lemon v. Kurtzman test for Establishment Clause issues. Both the Ninth Circuit and the district court properly applied the *Lemon* principles and made the correct ruling consistent with Establishment Clause jurisprudence. As such, review is not warranted and the petition should be denied.

STATEMENT OF THE CASE

According to Petitioner Ernesto Vasquez's First Amended Complaint, Los Angeles County adopted a County seal on March 1, 1957, that included various symbols of historic and cultural significance to the residents of Los Angeles County. (App. D[2], p. 57a,¶ 11.) The seal contained depictions of Pomona (the goddess of gardens and fruit trees); engineering instruments; a Spanish galleon; a tuna; a cow; a depiction of the Hollywood Bowl; two stars representing the motion picture industry; images of oil derricks; and a Latin cross. (App. B, p. 5a; App. D, p. 57a, ¶ 11.) Vasquez alleges that the Latin cross represented the influence of the church and the missions in California. (App. D, p. 57a, ¶ 11.) He alleges that the symbols on the former seal did not convey any impermissible religious message, and sent only a "historical and cultural message." (App. D, p. 57a, ¶ 11; pp. 58a-59a, ¶ 14.)

On June 1, 2004, the County decided to redesign the seal. (App. D, pp. 57a-58a, ¶ 12.) The symbols of Pomona, the cross, and the oil derricks were replaced by a Native American woman holding a basket and an

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[2] The appendices referred to in this Brief are attached to Vasquez's Petition.

image of Mission San Gabriel, a California mission. (App. B, p. 5a; App. C, pp. 32a-33a.)

Even though Vasquez contends that the former seal contained a historical and cultural message, (App. D, p. 57a, ¶ 11; pp. 58a-59a, ¶ 14), he alleges that the decision to redesign the seal without a cross sends a message of hostility toward Christians in violation of the Establishment Clause. In other words, Vasquez claims that a seal with a cross does not constitute an Establishment Clause violation; however, a seal that does not contain a cross, does in fact create such a violation.

Vasquez filed suit under 42 U.S.C. § 1983 against Respondents alleging a violation of the Establishment Clause. (App. D., p. 56a ¶ 9; pp. 60a-61a, ¶¶ 20, 21.) Respondents moved to dismiss in the district court pursuant to Federal Rule of Civil Procedure 12(b). The district court granted the motion and found that Vasquez lacked standing and failed to state a cognizable claim under the Establishment Clause. (App. C, pp. 29a-52a.) The Ninth Circuit disagreed with the trial court's ruling on the standing issue, but affirmed that Vasquez failed to state a cognizable claim under the Establishment Clause. (See App. B generally.) Vasquez now seeks review in this Court.

REASONS TO DENY THE WRIT PETITION

I. THE NINTH CIRCUIT PROPERLY APPLIED THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE AND FOUND THAT PETITIONER FAILED TO STATE A COGNIZABLE CAUSE OF ACTION.

A. The County's Decision to Design A New Seal Is Appropriately Within Its Discretion.

Initially, California Government Code § 25000 *et. seq.* grants county board of supervisors broad legislative powers, including the power to adopt a county seal. *See* Cal. Govt. Code § 25004. A county board of supervisors is entitled to exercise its discretion in making resolutions and ordinances. *Cosgrove v. County of Sacramento*, 252 Cal.App.2d 45, 50 (1967). Once exercised, legislative discretion is, absent special circumstances, not subject to judicial control or supervision. *California Ass'n. of Professional Employees v. County of Los Angeles*, 74 Cal.App.3d 38, 43 (1977).

In this case, the Los Angeles County Board of Supervisors' decision regarding which historical or cultural symbols are contained in its municipal seal is entirely within its discretion.

B. The Ninth Circuit's Holding is Consistent with Other Establishment Clause Cases.

Vasquez alleges that the removal of the cross from the County seal constitutes hostility toward

Christianity in violation of the Establishment Clause. The Establishment Clause of the First Amendment mandates governmental neutrality between religion and non-religion, as well as between the various religions. *McCreary County v. ACLU,* 545 U.S. 844, 859 (2005); *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968). It prohibits government fr m appearing to take a position on religion or from making adherence to a religion relevant in any way to a person's standing in the community. *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989).

Vasquez argues in his Petition that this Court should grant review because current Establishment Clause jurisprudence does not adequately address hostility claims. While Respondents agree that there appears to be more case law on alleged religious preference than on alleged religious hostility, existing case law on hostility adequately addresses the issue and review is not warranted.

The Establishment Clause applies to acts which promote a particular religion, and also to acts which disapprove of, or are hostile toward, religion. *American Family Ass'n. v. City and County of San Francisco*, 277 F.3d 1114, 1120-1121 (9th Cir. 2002), *cert. denied*, 537 U.S. 886 (2002); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *Wallace v. Jaffee*, 472 U.S. 38, 56 (1985). In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court established a test for analyzing government conduct under the Establishment Clause. Under the "*Lemon* test," government action complies with the Establishment Clause if it: (1) has a secular purpose; (2) its principal or primary effect neither advances nor inhibits

religion; and (3) it does not foster excessive government entanglement with religion. *Id.* at 612-613. While the *Lemon* test has been called into question in the past, in *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005), this Court reaffirmed its application to Establishment Clause questions. *See generally McCreary*, 545 U.S. at 844.

The Ninth Circuit properly applied the *Lemon* test to the case at hand and correctly found that Vasquez failed to state a cognizable claim against Respondents under the Establishment Clause.

1. Secular Purpose

First, the Ninth Circuit properly found that removing the cross from the seal had a secular purpose. The purpose inquiry asks whether the purpose of the government action is to endorse or disapprove of religion. *Edwards v. Aguillard*, 482 U.S. 578, 585. (1987). A secular purpose has to be genuine and not merely secondary to a religious objective. *McCreary,* 545 U.S. at 864. When there are both religious and legitimate secular purposes motivating government conduct, the existence of the secular purpose will satisfy the first *Lemon* prong. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

Vasquez claims in his Petition that the Court improperly attributed a secular purpose to Respondents, and that Respondents' claim of neutrality is simply a sham. In ruling on 12(b) motions, courts need not accept as true unreasonable inferences or conclusory allegations of law. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.

1981), *cert. denied*, 454 U.S. 1031 (1981). "The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary,* 545 U.S at 862. Contrary to Vasquez's argument, courts have correctly tested Establishment Clause issues at an early stage. *See American Family*, 277 F.3d at 1121-22; *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1258-60 (10th Cir. 2005); *McGinley v. Houston*, 361 F.3d 1328, 1332, (11th Cir. 2004), *cert. denied*, 540 U.S. 1000 (2003). In this case, the County's secular purpose is evident, not only from Vasquez's own allegations, but from the case law that has deemed the presence of crosses on municipal seals to be unconstitutional.

Initially, Vasquez's own Complaint defeats his claim. He alleges that the symbols on the seal, including the cross, do not convey any improper religious message, and are historical and cultural symbols. (App. D, p. 57a, ¶ 11; pp. 58a-59a, ¶ 14.) If the presence of the cross on the seal does not send a religious message, it defies reason that its removal could be construed as hostility toward religion. Vasquez also alleges in his Complaint that Respondents' decision was motivated by the threat of litigation by the American Civil Liberties Union. (App. D, p. 58a, ¶ 13.) A desire to avoid litigation is a secular purpose. Further, Vasquez alleges that the cross symbolized the influence of the church and the missions in California. (App. D, p. 57a, ¶ 11.) The new County seal contains a symbol of a mission. (App. A, p. 5a.) These allegations fail to support any reasonable

inference that Respondents' decision was motivated by hostility toward Christianity.

Further, when faced with Establishment Clause issues, courts must be reluctant to attribute unconstitutional motives to government actors where there is a plausible secular purpose. *American Family, supra,* 277 F.3d at 1120. Governments are required to maintain neutrality in religious matters. *See Epperson, supra,* 393 U.S. at 103-104. Case law holds that the presence of a cross on a municipal seal may violate the Establishment Clause. *See, e.g., Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (cross displays and city insignia with cross found to violate Establishment Clause); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991) (cross on seal found to violate Establishment Clause); *Friedman v. Board of County Comm. of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985) (seal with golden latin cross found to violate Establishment Clause); *ACLU v. Stow*, 29 F.Supp.2d 845 (N.D. Ohio 1998) (cross on City seal found to violate Establishment Clause); *Robinson v. City of Edmond,* 68 F.3d 1226 (10th Cir. 1995), *cert. denied*, 517 U.S. 1201 (1996) (presence of Latin cross on city seal found to violate Establishment Clause); *but see Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991) (cross on City insignia held not to violate Establishment Clause).

In this case, no clearer plausible secular purpose could exist than the County seeking to **avoid** a potential Establishment Clause violation, and affirm its neutrality by redesigning its seal. Given the above, the Ninth Circuit properly found that Vasquez failed to satisfy the first *Lemon* prong.

2. Primary Effect

The second question of the *Lemon* test considers whether the government action advances or inhibits religion. *Lemon, supra,* 403 U.S. at 612. The question is not whether any person might perceive an action to reflect official disapproval of a religious choice. "Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement." *Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J, concurring). The question is analyzed from the perspective of a "reasonable, objective observer" who is informed and familiar with the history of the government practice at issue. *American Family, supra,* 277 F.3d at 1122.

The Ninth Circuit properly found that Vasquez failed to state a claim under the second prong as well. A reasonable observer who is informed and familiar with the history of the county seal would not view Respondents' redesign of the seal as an act of hostility toward religion. This is especially true given that the presence of crosses on other municipal seals have been found to be unconstitutional. *See, e.g., Robinson,* 68 F.3d at 1232; *Harris*, 927 F.2d at 1413; *Friedman,* 781 F.2d at 778; *but see Murray,* 947 F.2d at 163.

Simply because government conduct is directed at religious material does not mean it automatically has a hostile effect. In *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied* 505 U.S. 1218 (1992), the Tenth Circuit held that removal of two religious books from the classroom shelves, and instructing a teacher to keep his bible out of sight during classroom hours

did not violate the Establishment Clause. The Court noted:

> The mere fact that the actions were aimed exclusively at Christian religious materials does not automatically mean the actions' primary effect was to send a disapproving message toward Christianity.

Id. at 1055; *see also Walz v. Egg Harbor Township*, 187 F.Supp.2d 232 (D. N.J. 2002), *aff'd* 342 F.3d 271 (3d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004) (prohibiting student from distributing religious pencils and candy during class did not constitute hostility toward religion in violation of the Establishment Clause).

The Ninth Circuit properly evaluated the second *Lemon* prong. A reasonable, objective, and informed observer would find that the decision to redesign the County seal, as well as the existence of a seal without a cross, does not have the primary effect of advancing or inhibiting religion.

3. Excessive Entanglement

The third prong of the *Lemon* test asks whether the government act fosters excessive entanglement between government and religion. *Lemon, supra,* 403 U.S. at 612-613. The entanglement prong seeks to minimize the interference of religious authorities with secular affairs and secular authorities in religious affairs. *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1399 (9th Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). The Ninth Circuit properly rejected Vasquez's

argument that removal of the cross from the seal caused a cognizable claim of excessive entanglement.

II. THE COURT'S RULING DOES NOT PROMOTE HOSTILITY TOWARD RELIGION AND ANY CONTRARY OPINION WOULD MAKE IT VIRTUALLY IMPOSSIBLE TO BE NEUTRAL.

Vasquez claims in his Petition that should this Court permit the Ninth Circuit's decision to stand, it "would pave the road for removing all religious imagery or references from official recognition because they represent religion." (Petition, p. 8.) However, as Vasquez points out in his Petition, this Court has already made clear that simply having religious content or promoting a message consistent with a religious doctrine does not equate with a violation of the Establishment Clause. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 212 (1963); *Van Orden v. Perry*, 545 U.S. 677, 690 (2005).

Further, and in any event, the law does not charge government entities with a requirement to recognize religion in their municipal seals. Vasquez essentially argues that once a county has chosen to recognize a symbol that may have some religious significance, the county is bound to retain that symbol in perpetuity because removal would constitute hostility. As discussed above, the law does not support this position. As set forth in *McGinley v. Houston,* 282 F.Supp.2d

1304 (M.D. Ala. 2003), *aff'd* 361 F.3d 1328 (11th Cir. 2004), *cert. denied*, 540 U.S. 1000 (2003):

> [The Supreme] Court has made clear that the neutrality mandated by the establishment clause does not itself equate with hostility towards religion. [Citations omitted]. It does not 'accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion.' [Citations omitted] **To hold that the government cannot endorse religion does not 'manifest a governmental hostility to religion** or religious teachings ...'

Id. at 1308. (Emphasis added.) Current Establishment Clause jurisprudence adequately addresses these issues. As such, this case does not merit consideration by this Court.

CONCLUSION

For the foregoing reasons, Respondents ask that this Court deny the petition for a writ of certiorari.

DATED: October 29, 2007

Respectfully submitted,

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